

AMENDED IN SENATE APRIL 8, 2013

SENATE BILL

No. 588

Introduced by Senator Emmerson

February 22, 2013

An act to amend Sections 1158 and 1563 of the Evidence Code, relating to evidence.

LEGISLATIVE COUNSEL'S DIGEST

SB 588, as amended, Emmerson. Medical records: reproduction fees.

(1) ~~Existing~~ *Before the filing of an action or the appearance of a defendant in an action, existing* law requires certain enumerated health care providers to make all of a patient's records under their custody or control available for inspection and copying by an attorney at law, or his or her representative, who presents a written authorization therefor, as specified. Existing law authorizes any person or enumerated health care provider to charge all reasonable costs incurred in making the patient records available against the person whose written authorization required the availability of the records, as specified. Where the medical records are delivered to the attorney or the attorney's representative for inspection or photocopying at the record custodian's place of business, existing law prohibits the fee for complying with the authorization from exceeding \$15 dollars, plus actual costs, as specified.

~~This bill would delete the provision that authorizes all reasonable costs to be charged against the person whose written authorization required the availability of the records, and would instead require certain fees for producing paper or electronic copies of medical records, including a search and retrieval fee of \$30 dollars; a fee of 50 cents per page for the first 25 pages and 25 cents for each additional page, as specified; a fee of 50 cents per page for reproduction of documents~~

~~stored on microfilm, oversize documents, or documents requiring special processing; actual postage charges, as specified; and the actual cost, if any, charged to the witness by a third party for the retrieval and return of records held offsite by that third party. The bill also would delete the provision that prohibits the fee from exceeding \$15 dollars, plus actual costs, as specified, provide that, where the records are delivered to the attorney or the attorney's representative for inspection or photocopying copying at the record custodian's place of business. The bill would provide that an electronic copy of a patient's medical record is required only under specified conditions business and if any portion of the patient's medical records is stored on paper, the fee for complying with the authorization would be \$15 dollars, plus actual costs, as specified. If any portion of the records is stored electronically and is inaccessible for inspection or copying, the bill would authorize the health care provider, in its sole discretion, to produce a paper copy of the electronic records for the attorney to inspect and copy, and to charge specified fees.~~

The bill would delete the provision that authorizes all reasonable costs to be charged against the person whose written authorization required the production of copies of the records, and would instead require an attorney who requests that the health care provider provide paper or electronic copies of the medical records to pay certain fees, including a search and retrieval fee of \$30 dollars; a fee of 50 cents per page for the first 25 pages and 25 cents for each additional page, as specified; a fee of 50 cents per page for reproduction of documents stored on microfilm, oversize documents, or documents requiring special processing; actual postage charges, as specified; and the actual cost, if any, charged to the witness by a third party for the retrieval and return of records held offsite by that third party. The bill also would require the health care provider to provide electronic copies of a patient's medical records that are stored electronically, under specified conditions.

This bill would, no later than December 1 of each year, require the Director of the California Department of Health Care Services to examine the need to increase or decrease the specified fees by making a calculation based on the Consumer Price Index for All Urban Consumers published by the United States Department of Labor, Bureau of Labor Statistics, as specified, and would authorize the Director to increase or decrease the fees at his or her sole discretion. The bill would prohibit the fees from remaining unchanged for 3 consecutive years

unless the Consumer Price Index does not change during that 3-year period. The bill would require any changes to the rates to be effective on January 1 following the December 1 calculation and to be published on the Department of Health Care Services Internet Web site on or before that date.

(2) Existing law provides for procedures for the production of business records pursuant to a subpoena duces tecum. Existing law authorizes all reasonable costs, as specified, incurred by a nonparty witness to be charged against the party serving the subpoena duces tecum.

This bill would clarify that the reasonable costs incurred by a nonparty witness do not apply to fees incurred in response to a subpoena for the production of medical records. Instead, the fees established for the production of medical records pursuant to an authorization would apply to the production of medical records in response to a subpoena.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1158 of the Evidence Code is amended
2 to read:

3 1158. (a) *As used in this section, the term “health care*
4 *provider” includes a patient’s physician and surgeon, dentist,*
5 *registered nurse, dispensing optician, registered physical therapist,*
6 *podiatrist, licensed psychologist, osteopathic physician and*
7 *surgeon, chiropractor, clinical laboratory bioanalyst, clinical*
8 *laboratory technologist, or pharmacist or pharmacy, duly licensed*
9 *as such under the laws of the state, or a licensed hospital.*

10 (b) Before the filing of ~~any~~ an action or the appearance of a
11 defendant in an action, ~~if~~ an attorney at law, or his or her
12 representative ~~presents a written~~, *may inspect or copy a patient’s*
13 *medical records upon presentation of a written authorization to*
14 *a health care provider, as follows:*

15 (1) ~~The written authorization therefor, or a copy thereof, shall~~
16 ~~be signed by an adult patient, patient; by the guardian or~~
17 ~~conservator of his or her person or estate, or, in the case of a minor,~~
18 ~~by a parent or guardian of the minor, minor; or by the personal~~
19 ~~representative or an heir of a deceased patient, or a copy thereof,~~
20 ~~a physician and surgeon, dentist, registered nurse, dispensing~~

1 optician, registered physical therapist, podiatrist, licensed
2 psychologist, osteopathic physician and surgeon, chiropractor,
3 clinical laboratory bioanalyst, clinical laboratory technologist, or
4 pharmacist or pharmacy, duly licensed as such under the laws of
5 the state, or a licensed hospital, shall make all of the patient's
6 records under that person or entity's custody or control available
7 for inspection and copying by the attorney at law or his or her
8 representative, promptly upon the presentation of the written
9 authorization.

10 (1) Copying of medical records stored on paper shall not be
11 performed by any medical provider or employer described in
12 subdivision (a), or by an agent thereof, when the requesting
13 attorney has employed a professional photocopier or anyone
14 identified in Section 22451 of the Business and Professions Code
15 as his or her representative to obtain or review the records on his
16 or her behalf. The presentation of the authorization by the agent
17 on behalf of the attorney shall be sufficient proof that the agent is
18 the attorney's representative.

19 (2) An electronic copy of a patient's medical record shall be
20 required only if all of the following conditions are met:

21 (A) The entire request can be reproduced from an electronic
22 health record system.

23 (B) The medical record is specifically requested to be delivered
24 in electronic format.

25 (C) The medical record can be delivered electronically. *patient.*

26 (2) *An attorney requesting to inspect records under this*
27 *subdivision may employ a professional photocopier, or any person*
28 *or entity identified in Section 22451 of the Business and Professions*
29 *Code, as his or her representative to obtain or review the records*
30 *stored on paper on his or her behalf. The presentation of the*
31 *written authorization by the agent on behalf of the attorney shall*
32 *be sufficient to prove that the agent is the attorney's representative.*

33 (3) Failure to make the records stored on paper available for
34 inspection or copying during business hours, within five days after
35 the presentation of the written authorization, may subject the person
36 or entity having custody or control of the records *health care*
37 *provider* to liability for all reasonable expenses, including
38 attorney's fees, incurred in any proceeding to enforce this section.
39 *subdivision.*

1 (4) If any portion of a patient's medical records is stored on
2 paper and delivered to the attorney or the attorney's representative
3 for inspection or copying at the record custodian's place of
4 business, the fee for complying with the authorization shall be
5 fifteen dollars (\$15), plus actual costs, if any, charged to the record
6 custodian by a third party for retrieval and return of records held
7 offsite by that third party.

8 (5) If any portion of a patient's medical records is stored in an
9 electronic health record that is inaccessible for inspection or
10 copying, the health care provider, or an agent thereof, in its sole
11 discretion, may elect to provide a paper copy of the electronic
12 records for inspection or copying by the attorney, or his or her
13 representative, and the health care provider may charge a search
14 and retrieval fee of thirty dollars (\$30), plus a fee of fifty cents
15 (\$0.50) per page for the first 25 pages and twenty-five cents (\$0.25)
16 for each additional page for the labor involved in ensuring
17 compliance with the federal Health Insurance Portability and
18 Accountability Act of 1996 (42 U.S.C. Sec. 300gg).

19 ~~(b) (1) Fees may be charged~~

20 (c) Before the filing of an action, or the appearance of a
21 defendant in an action, an attorney at law, or his or her
22 representative, may request a health care provider, upon
23 presentation of a written authorization form prescribed by
24 paragraph (1) of subdivision (b), to provide paper or electronic
25 copies of the patient's medical records, as follows:

26 (1) Electronic copies of the patient's medical records that are
27 stored electronically shall be provided if all of the following
28 conditions are met:

29 (A) The entire request can be reproduced from an electronic
30 health record.

31 (B) The medical record is specifically requested to be delivered
32 in electronic format.

33 (C) The medical record can be delivered electronically.

34 (2) The health care provider shall charge a fee for the providing
35 of paper or electronic copies of the patient's medical records that
36 ~~are requested pursuant to this section,~~ records, as follows:

37 (A) A search and retrieval fee of thirty dollars (\$30), plus a fee
38 of fifty cents (\$0.50) per page for the first 25 pages and twenty-five
39 cents (\$0.25) for each additional page.

(B) Fifty cents (\$0.50) per page for reproduction of oversized documents, diagnostic test results, or documents stored on microfilm.

~~(C) If any portion of the medical record is stored in an electronic health record, and the medical provider or employer described in subdivision (a), or an agent thereof, elects, in its sole discretion, to print the records, a fee of fifty cents (\$0.50) per page for the first 25 pages and twenty-five cents (\$0.25) for each additional page for the labor involved in ensuring compliance with the federal Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Sec. 300gg).~~

~~(D)~~
(C) Actual postage charges, if any, incurred by the health care provider to deliver the paper records by mail to the requesting attorney, or his or her representative. If the requesting party receives the records are produced electronically, postage shall not be charged, but a fee for actual delivery costs, if any, shall apply.

~~(E)~~
(D) The actual cost, if any, charged to the record custodian by a third party for retrieval and return of records held offsite by that third party.

~~(2)~~
(3) Failure to provide paper or electronic copies of the patient's medical record within 30 days after the presentation of the written authorization and request for copies, or within 60 days if the records are stored offsite, may subject the health care provider to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this subdivision.

(d) Medical records requested pursuant to Section 1563 are subject to the fees described in this section and are not subject to the reasonable costs described in paragraph (1) of subdivision (b) of Section 1563. Notwithstanding paragraph (1) of subdivision (b) of Section 1563, Section 1563 applies to subpoena requests for medical records.

~~(e)~~
(e) No later than December 1 of each year, the Director of the California Department of Health Care Services shall examine the need to increase or decrease the fees described in this section by making a calculation based on the Consumer Price Index for All Urban Consumers (United States city average, all items) published

1 by the United States Department of Labor, Bureau of Labor
2 Statistics, for the 12-calendar-month period commencing prior to
3 the first day of December. The director may, in his or her sole
4 discretion, elect to increase or decrease the fees described in this
5 section based on this calculation. These fees shall not remain
6 unchanged for three consecutive years unless the Consumer Price
7 Index does not change for those three consecutive years. Any
8 changes to the rates shall be effective on January 1 following the
9 December 1 calculation and published on or before that date on
10 the Department of Health Care Services Internet Web site.

11 ~~(d)~~

12 (f) A patient not represented by an attorney who wishes to
13 receive a copy, or examine all or part, of his or her medical record
14 shall submit a written request to the health care provider pursuant
15 to Section 123110 of the Health and Safety Code.

16 SEC. 2. Section 1563 of the Evidence Code is amended to read:

17 1563. (a) This article does not require tender or payment of
18 more than one witness fee and one mileage fee or other charge to
19 a witness or witness' business, unless there is an agreement to the
20 contrary between the witness and the requesting party.

21 (b) All reasonable costs incurred in a civil proceeding by a
22 witness who is not a party with respect to the production of all or
23 any part of business records the production of which is requested
24 pursuant to a subpoena duces tecum shall be charged against the
25 party serving the subpoena duces tecum.

26 (1) "Reasonable costs," as used in this section, includes the
27 following specific costs:

28 (A) Ten cents (\$0.10) per page for standard reproduction of
29 documents of a size 8 ½ by 14 inches or less.

30 (B) Twenty cents (\$0.20) per page for copying of documents
31 from microfilm; actual costs for the reproduction of oversize
32 documents or the reproduction of documents requiring special
33 processing which are made in response to a subpoena.

34 (C) Reasonable clerical costs incurred in locating and making
35 the records available to be billed at the maximum rate of
36 twenty-four dollars (\$24) per hour per person, computed on the
37 basis of six dollars (\$6) per quarter hour or fraction thereof.

38 (D) Actual postage charges.

1 (E) The actual cost, if any, charged to the witness by a third
2 party for the retrieval and return of records held offsite by that
3 third party.

4 (2) Notwithstanding paragraph (1), if records are delivered
5 pursuant to a subpoena under this article to the attorney, the
6 attorney's representative, or the deposition officer for inspection
7 or photocopying at the witness' place of business, the ~~cost~~
8 *reasonable costs* for complying with the subpoena shall not exceed
9 fifteen dollars (\$15), plus the actual cost, if any, charged to the
10 witness by a third party for retrieval and return of records held
11 offsite by that third party. If the records are retrieved from
12 microfilm, the reasonable costs, as defined in paragraph (1), shall
13 also apply.

14 (3) The fees described in paragraphs (1) and (2) do not apply
15 to a subpoena for the production of medical records, the fees for
16 which are governed by subdivision (b) of Section 1158.

17 (c) The requesting party, or the requesting party's deposition
18 officer, shall not be required to pay the reasonable costs or any
19 estimate thereof before the time the records are available for
20 delivery pursuant to the subpoena, but the witness may demand
21 payment of costs pursuant to this section simultaneous with actual
22 delivery of the subpoenaed records, and until payment is made,
23 the witness is under no obligation to deliver the records.

24 (d) The witness shall submit an itemized statement for the costs
25 to the requesting party, or the requesting party's deposition officer,
26 setting forth the reproduction and clerical costs incurred by the
27 witness. If the costs exceed those authorized in paragraph (1) of
28 subdivision (b), or in subdivision (b) of Section 1158 for the
29 reproduction of medical records, or if the witness refuses to produce
30 an itemized statement of costs as required by this subdivision,
31 upon demand by the requesting party, or the requesting party's
32 deposition officer, the witness shall furnish a statement setting
33 forth the actions taken by the witness in justification of the costs.

34 (e) The requesting party may petition the court in which the
35 action is pending to recover from the witness all or a part of the
36 costs paid to the witness, or to reduce all or a part of the costs
37 charged by the witness, pursuant to this subdivision, on the grounds
38 that those costs were excessive. Upon the filing of the petition the
39 court shall issue an order to show cause and from the time the
40 order is served on the witness the court has jurisdiction over the

1 witness. The court may hear testimony on the order to show cause
2 and if it finds that the costs demanded and collected, or charged
3 but not collected, exceed the amount authorized by this subdivision,
4 it shall order the witness to remit to the requesting party, or reduce
5 its charge to the requesting party by an amount equal to, the amount
6 of the excess. In the event that the court finds the costs excessive
7 and charged in bad faith by the witness, the court shall order the
8 witness to remit the full amount of the costs demanded and
9 collected, or excuse the requesting party from any payment of
10 costs charged but not collected, and the court shall also order the
11 witness to pay the requesting party the amount of the reasonable
12 expenses incurred in obtaining the order, including attorney's fees.
13 If the court finds the costs were not excessive, the court shall order
14 the requesting party to pay the witness the amount of the reasonable
15 expenses incurred in defending the petition, including attorney's
16 fees.

17 (f) If a subpoena is served to compel the production of business
18 records and is subsequently withdrawn, or is quashed, modified
19 or limited on a motion made other than by the witness, the witness
20 shall be entitled to reimbursement pursuant to paragraph (1) of
21 subdivision (b) for all reasonable costs incurred in compliance
22 with the subpoena to the time that the requesting party has notified
23 the witness that the subpoena has been withdrawn or quashed,
24 modified or limited. In the event the subpoena is withdrawn or
25 quashed, if those costs are not paid within 30 days after demand
26 therefor, the witness may file a motion in the court in which the
27 action is pending for an order requiring payment, and the court
28 shall award the payment of expenses and attorney's fees in the
29 manner set forth in subdivision (e).

30 (g) If the personal attendance of the custodian of a record or
31 other qualified witness is required pursuant to Section 1564, in a
32 civil proceeding, he or she shall be entitled to the same witness
33 fees and mileage permitted in a case where the subpoena requires
34 the witness to attend and testify before a court in which the action
35 or proceeding is pending and to any additional costs incurred as
36 provided by subdivision (b).